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Appeal of:	:	
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SUNBELT PROPERTIES, INC.,	:	HUDBCA No. 94-G-121-C1
	:	
Appellant	:	
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Contract No. C6565935A001	:	
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John Powell Walker, President Sunbelt Properties, Inc. 3535 N.W. 58th Street, Suite 950 Oklahoma City, OK 73112-4802	Appellant, <u>pro se</u>
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Bruce M. Kasson, Esq. Office of General Counsel U.S. Department of Housing and Urban Development 451 7th Street, SW, Room 10176 Washington, DC 20410	For the Government
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Decision By Administrative Judge Jean S. Cooper

February 16, 1999

Statement of the Case

This is an appeal from a final decision of a contracting officer terminating Contract No. C6565935A001 for default. The contract was a Real Estate Asset Management (REAM) contract for the management of all single-family HUD-owned properties in five counties surrounding Oklahoma City, Oklahoma. The contract was awarded by the Oklahoma Office of the U.S. Department of Housing and Urban Development (HUD) to Sunbelt Properties, Inc. (Sunbelt or Appellant) on June 1, 1993, and terminated for default on July 12, 1993, 42 days after award.

Appellant filed a timely notice of appeal with the HUD Board of Contract Appeals, contesting the termination for default. For a period of two years after the Board docketed this case, the parties engaged in discovery and a number of discovery disputes were resolved by the Board. On April 19, 1995, the Murrah Federal Building in Oklahoma City was destroyed by a bomb. The Government Technical Representative and Government counsel were killed in the explosion, and other HUD employees who would be witnesses in this case were injured. Many documents relevant to the case were also destroyed in the explosion.

In 1996, this case was reassigned to Administrative Judge Jean S. Cooper following the death of the Board administrative judge who had presided over this case. Discovery was ordered to be completed by October 11, 1996. Thereafter, a consolidated hearing on this case and two related Limited Denial of Participation cases were heard in Oklahoma City.

Findings of Fact

1. On February 1, 1993, HUD issued an Invitation for Bids for a firm fixed-price indefinite quantity REAM service contract for real estate asset management services for the Oklahoma City metropolitan area. The contract was designated as a small business set-aside contract. (AF Tab 2.1).

2. Although no representative of Appellant attended the pre-bid conference held on February 16, 1993, HUD prepared a transcript of the conference and provided it to all prospective bidders, including Appellant. At the pre-bid conference, a document with questions and answers about the contract was read aloud and was included in the transcript. One of the answers read aloud that was transcribed stated that for the services described in Service Items 1 through 39, HUD would be financially responsible for Service Items 7, 10, 16, 27, 30 and 32. HUD also gave an amendment clarifying the solicitation to all prospective bidders, including Appellant. At the pre-bid conference, bidders were told by HUD Government Technical Representative (GTR) Larry Cook that time frames were critical to the contract and that HUD would enforce those time frames strictly. Cook specifically stated that the REAM contractor would be required to hang a lock box quickly on a property so the appraiser would have access to the property, and the REAM contractor would be required to replace keys for the lock boxes. (AF Tabs 2.2, 4.1, 4.2; Tr. 344-356.)

3. The contracting officer requested that John Powell Walker, Appellant's president, verify Appellant's bid because it was lower than many of the 18 bids received, and it was also lower than the independent Government estimate for the cost of performance of the contract. The request for verification of bid pointed out the differences between the REAM contract and prior HUD area management broker contracts with which Appellant was more familiar. The contracting officer requested that Appellant verify that it had the necessary resources to deliver the contract services, such as adequate trained staff and an equipped office reasonably located to provide convenient services to HUD and its clients. Appellant provided written answers to the contracting officer. One area that the contracting officer was particularly concerned about was Appellant's statement that it had "zero" employees. Appellant responded that Walker and Charles "Buddy" Jones would both be "hired" if the contract were awarded to Appellant, and three other real estate agents were also available. Walker would organize and oversee the contract, as well as make most of the organizational decisions. Jones would be the "key" person with whom HUD would deal with most of the time. Appellant stated that it intended to hire subcontractors to perform most of the contract services. The contracting officer referred the matter to the Small Business Administration (SBA) to determine whether Appellant had the capacity to perform the contract, which was set aside for a small business. The SBA determined that Appellant qualified as a small business for the set-aside, and that it had the capacity to perform the contract. Based on that determination, the contracting officer deemed Appellant to be a responsible bidder, and awarded it the contract. (AF Tabs 3.1-3.6; Tr. 358-364.)

4. On May 5, 1993, the REAM contract was awarded to Sunbelt by the HUD Oklahoma Office. Work was to begin on June 1, 1993. Appellant was to manage and maintain the properties in the contract inventory so that they could be sold as soon as possible. At the time of award, there were about 450 HUD-owned properties in the contract inventory. (AF Tab 2.1; Tr. 114.)

5. Prior to commencement of the contract, HUD held an orientation meeting on May 7, 1993, with Appellant represented by Walker and Jones. The required contract services were reviewed, including the time frames for performing the services, and the authority of the various HUD contracting

officials. Appellant's representatives asked few questions about the contract requirements. They requested a print-out of the contract inventory as of May 7, 1993, so that Appellant could set up a computer program that it intended to use in its performance of the contract. The computer program, designed by Mark Estes, was to make Sunbelt "work smart" with almost no employees. Sunbelt spent most of its time prior to the contract start date of the contract inputting property data into the computer program, and did not even do a spot check of a few of the properties to determine their condition. Had Sunbelt used the May printout to check property conditions, it would have been aware that some of the properties were very overgrown and would require different lawn services than Sunbelt had planned on using. (AF Tab 3.7; Tr. 366-368, 909-910.)

6. Walker sent a letter dated May 25, 1993, to the contracting officer which stated that he had directed Jones to "limit his discussion concerning the properties" to the GTR. Walker also stated in the May 25 letter that Appellant would accept only 15-20 lock boxes as spares for replacement. (AF Tab 3.8.)

7. On June 1, 1993, Appellant was given a delivery order in the form of a SAMS inventory status report containing a list of all properties that HUD believed were in the contract inventory on the date of contract commencement. On July 15, 1993, HUD gave Appellant a second delivery order which correlated to the SAMS inventory status report dated July 1, 1993, to confirm all of the properties assigned to Appellant in June, 1993. HUD gave Appellant a third delivery order to confirm all of the properties assigned to it between July 1 and July 12, 1993, with a SAMS report accompanying it. (AF Tabs 2.5, 2.6, 2.7; Tr. 272-380.)

8. Service Item 1 of the contract required Appellant to inspect all properties on the initial listing of properties assigned to it under the contract on June 1, 1993, within 15 days of contract commencement. The contracting officer directed Appellant to document those initial inspections on a HUD Form 9516A, which required a detailed inspection. The authority for directing that the Form 9516A be used was at service Item 36. The purpose of requiring Appellant to perform a detailed initial inspection on all properties in the contract inventory was two-fold: (1) to familiarize Appellant with the contract inventory, and (2) to let HUD know the condition of all of the properties at the start of the contract. (AF Tab 2.1; Tr. 115-116.)

9. As of June 22, 1993, HUD had not received any initial inspection reports from Appellant on the properties that were in the contract inventory on June 1, 1993. Trish Nix, the GTR assigned to administer the contract on a day-to-day basis, sent Appellant a Rapid Reply letter dated June 22, 1993, advising Appellant that it was required to perform an initial inspection on each of those properties. At no time during performance of the contract did Appellant ever perform or document initial inspections on the properties in the initial listing of the contract inventory on June 1, 1993. The only inspections performed on those properties were walkthroughs by Jones, the contract supervisor, who made sketchy notes on a legal pad about the properties. (AF Tab 4.23; Exhibit G-2; Tr. 120, 919-922.)

10. Service Item 3 of the contract required Appellant to initially inspect a newly assigned property, to post HUD warning signs, and to provide access to the property for the appraiser within 48 hours of assignment. The initial inspection was to be documented on HUD Form 9516A, which was to be turned into HUD within 5 working days of assignment. The warning sign was to be

posted in a conspicuous location, and contain the name, address and telephone number of Appellant, so that Appellant could be promptly reached in an emergency. (AF Tab 2.1; Tr. 129, 134-135.)

11. Appellant did not post HUD warning signs on at least 14 properties, based on HUD's inspections of properties in the contract inventory, in violation of Service Item 3 of the contract. Some properties had out-of-date warning signs lacking any information about how to contact Appellant. Properties with out-of-date warning signs had been in the initial listing of properties assigned to Appellant on June 1, 1993, and had been previously managed by a company named Property Watch, whose name and telephone number still appeared on the posted warning signs. Property Watch received numerous calls, based on the outdated signs, and expressed concern to HUD that its reputation was being hurt by association with the poor maintenance being performed by Appellant. Although the warning sign problem was initially due to HUD running out of the signs, that supply problem was corrected within a few days. Appellant did not replace Property Watch warning signs with Sunbelt signs even after there were enough signs to post. For a property located at 2531 NW 42<sup>nd</sup> Street, which was assigned to Appellant on June 10, 1993, Appellant failed to comply with any of the requirements of Service Item 3 of the contract. (AF Tab 3.20; Exh. G-4; Tr. 862-864, 913.)

12. Service Item 7 of the contract required Appellant to remove and dispose of interior and exterior trash and debris, and to leave the property "broom clean" within ten days of assignment, and thereafter as conditions warrant. On one property in the contract inventory, Appellant failed to remove clothing, "junk" and broken glass in a room, and debris in the yard, including broken glass, as evidenced by an inspection report. On another property, it failed to remove truck parts in the yard and in the garage, despite receiving Rapid Reply letters from Nix about the need to remove them. Failure to remove these items from the two properties was in violation of Service Item 7 of the contract. (Exh. G-9.)

13. Service Item 8 of the contract required Appellant to secure properties to prevent unauthorized entry and damage by the elements, as conditions warranted. The specifications for securing were set out in Exhibit 3 to Service Item 8 in the contract. Securing included replacing broken glass, broken locks, and securing doors and windows. If vandalism was a persistent problem, Appellant was to board up the windows and doors in accordance with the contract specifications. One property in Appellant's inventory was found, upon inspection, to be unsecured, with windows "wide open," three weeks after the condition was initially called to Appellant's attention in a Rapid Reply letter. Another property had an unsecured storm cellar, which Nix had directed Appellant to correct by a certain date, but Appellant did not do so. A third property had three broken windows and a broken French door that needed to be secured promptly. Nix directed Appellant to correct these items, but Appellant had still failed make these repairs and to secure the property weeks after the problem was called to its attention. (AF Tab 2.1; Exh. G-10.)

14. Service Item 10 of the contract required Appellant to secure and/or winterize swimming pools in accordance with local codes within five days of assignment. Also, Service Item 12 of the contract required Appellant to eliminate conditions which present a safety hazard within 24 hours of discovery. On a property included in the initial listing, there was an aboveground pool with stagnant water that was undrained and unsecured. Appellant did not drain the pool or secure the pool within five days of assignment. The GTR sent

Appellant a directive to drain the pool by June 15, 1993, but Appellant failed to do so. The GTR again directed Appellant to cure the safety hazard at the property and secure the pool, extending the time to do so until July 2, 1993, after Appellant had failed to correct the problem by June 25, 1993. Appellant contended that it did not drain the pool because the property had been sold, but failed to produce any evidence to support that contention. (AF Tab 2.1; Exh. G-11.)

15. Service Item 13 of the contract required Appellant to "[a]ssume responsibility for keys and/or lock boxes, per HUD's instructions" within 48 hours of assignment and ongoing. Exhibit 6 of the contract specifications grid states that Appellant must install at its own expense a HUD-approved lock box and key, but that HUD would provide the lock box. Whenever a lock was missing or inoperative, the lock box was to be replaced by Appellant. Within 48 hours after notification that a property was scheduled to close, Appellant was to issue keys to the purchaser, and to remove the lock box and lock box key. The purpose of the lock box was to provide access to the properties to appraisers, repair contractors, real estate brokers, and inspectors. Appellant refused to install lock boxes as required by the contract until Appellant "had an agreement with HUD as to who was responsible for payment of the same." As a result of Appellant's refusal to install lock boxes within 48 hours of assignment, per Service Item 13, appraisers were not able to perform appraisals on at least 21 properties in Appellant's inventory. The lock box problem continued until termination of the contract, by Appellant's own admission. (AF Tabs 2.1, 3-12, 3.14; Exhs. G-7, G-8, G-12; Tr. 186-188, 838.)

16. Appellant refused to remove some lock boxes from properties, as required by Service Item 13 of the contract, because it was not given notice to remove them until after the closing had taken place. As of about July 1, 1993, Appellant refused to accept responsibility for the removal of any of the lock boxes after a closing had taken place, and told brokers or purchasers to remove them because Appellant was concerned about the liability of its employees entering a closed property. Even before July 1, 1993, HUD had received complaints about Appellant's failure or refusal to remove lock boxes, and Nix sent a number of Rapid Reply letters to Appellant to perform this contract obligation. The issue of lock box removal was primarily caused by the lack of notice to Appellant of an impending closing, which was under HUD's control. However, in the first month of the contract when Appellant was still willing to remove lock boxes after closing, when timely notice was not given, there were delays of as long as 3-1/2 weeks for the removal to take place. (AF Tab 2.1; Exh. G-12; Tr. 193-201; 857-861.)

17. Service Item 14 of the contract required Appellant to ensure that grass and shrubbery were cut in a professional looking manner, with clippings removed, snow removed from walkways and sidewalks, and that "properties are maintained in a presentable conditions at all times." This work was to be done "as needed," in accordance with Exhibit 7 of the contract specifications grid. Exhibit 7 required that initial maintenance services per Service Item 14 be completed within 5 days after a property was assigned. Lawn mowing was required to be done twice a month, approximately every 14 days, and grass was to be cut no higher than two inches. Appellant was required by the contract to regularly cut down weeds, and to edge paved areas and planting beds three times during the mowing season. The premises were to be cleared of clippings, debris, leaves, and cuttings. Pruning of bushes and trees was to be done within the first 30 days of the mowing season, or within 30 days after receipt of a new acquisition. Appellant was required by Exhibit 7 to provide, at its own expense, "competent, full-time supervision of the work while it is actually in progress." If climate

conditions required more frequent or less frequent lawn mowing services, HUD could direct Appellant in writing to increase or decrease mowing services. Exhibit 7 further stated that there would be no additional compensation allowed for oversized lots, excessive grass growth or debris removed. No lawn mowing services were to be performed on an occupied property. (AF Tab 2.1.)

18. Appellant consistently failed to perform the requirements of Service Item 14. As of June 29, 1993, HUD found that only a few lawns had been mowed on the properties in Appellant's inventory, based on property inspections and telephone complaints made to HUD. As of July 7, 1993, some had still not been cut. At some properties, the grass was six feet tall, and weeds were three feet tall. Neighbors cut some front yards when Appellant failed to do the required mowing, so that the neighborhood would not look so bad. Rapid Reply letters were sent to Appellant when complaints were received to direct Appellant to mow the problem lawns immediately. Appellant ignored Rapid Reply letters from HUD indicating a lawn was ready to be cut. Nix and other HUD employees sent Rapid Reply letters to Appellant when HUD was being cited for municipal violations and charged fines because properties were so overgrown that their conditions were in violation of local ordinances, but Appellant did not do the work required. Some lawns were not cut for six or eight weeks, and HUD was unable to persuade Appellant to perform the required lawn maintenance service tasks on these properties. When dates for performance were extended by Rapid Reply letters, Appellant still failed to comply. Appellant never provided the required on-site supervisor for the lawn maintenance work, as required by the contract, letting the subcontractor, Stephen Pruitt, "supervise" himself. Appellant entered into an agreement with Pruitt that he could leave grass clippings on the properties and mulch them the next time he serviced those properties, in violation of the contract requirement that all clippings were to be removed when cut. Jones was the inspector for this work. He believed that all lawns were not properly cut and cleared until around July 12, six weeks into the contract. (AF Tab 4.20; Exhs. G-13, G-14; Tr. 838, 906-908, 927-928.)

19. Service Item 16 of the contract required Appellant to forward homeowners association bills to HUD's contractor for payment to avoid penalties. Late payment penalties would be assessed to Appellant. This was to be done within five days of assignment "and ongoing." A property in Appellant's inventory was unable to close on schedule because Appellant had failed to get the homeowner's association dues bill paid in a timely manner. (AF Tab 2.1; Exh. G-15.)

20. Service Item 18 of the contract required Appellant to inspect completed repairs to ensure that repairs were satisfactory. Appellant had to complete an inspection report form (Form 9519) and a Form 1106 within 24 hours of notification by the repair contractor that the work was done. (AF, Tab 2.1; Tr. 272-273.)

21. The GTR issued repair authorization letters to Appellant to have repairs done on properties to make those properties marketable. Appellant knew that time was of the essence to get the repairs completed so that the properties could be sold. It was Appellant's duty under Service Item 18 and Exhibit 8 of the contract specifications grid to actively monitor the progress of the repair work, and to identify and resolve potential performance problems. If a repair authorization letter expired, it was Appellant's duty to request an extension from the GTR. (Exh. G-17; Tr. 273-275, 918.)

22. Starting on June 21, 1993, Nix sent Appellant Rapid Reply letters with lists of properties with expired repair authorization letters that needed

to be extended, and the repairs completed. Appellant was directed to advise Nix of the status of these repairs within three days of the date of each Rapid Reply letter. Appellant ignored Nix's request in the first Rapid Reply letter. Nix again asked for the status of all but one of the same repairs in a second Rapid Reply letter dated June 29, 1993. Appellant did not provide Nix with the information she requested, or request an extension of the expired repair authorization letters. Starting on June 3, 1993, Nix sent Appellant Rapid Reply letters concerning unacceptable repairs ordered by the prior REAM contractor but which Appellant needed to get corrected, and she also sent Appellant Rapid Reply letters concerning the status of repairs ordered by Appellant. Appellant did not respond to the Rapid Reply letters. The closing of at least one property was delayed due to Appellant's failure to have defective paint repaired. According to Appellant, it refused to have any defective paint repaired unless HUD paid to have a lead-based paint test performed on the paint prior to removal, which the contracting officer refused to do. Appellant was aware that it was responsible under the contract for repair of all "defective paint," but did not inquire prior to bidding whether it had to test for lead-based paint under that contract provision. The contracting officer never directed Appellant to test for lead-based paint. Appellant admitted that it had the equipment to "easily" test for the presence of lead-based paint, but refused to do so without additional compensation. No defective paint was repaired on any houses because Appellant refused to order those required repairs, and there is no evidence that any of the defective paint presented a lead hazard. (Exh. G-17; Tr. 276-286; 957-963,)

23. Appellant knew or should have known about repairs for which the prior REAM contractor, Property Watch, had contracted or obtained HUD approval to contract because Appellant was given the prior REAM contractor's files for each property that was in the contract inventory as of mid-May, 1993. Those files contained repair listings and repair authorization letters, including information on repairs that were escrowed and were to be done after closing at HUD's expense. (Tr. 287-291.)

24. Service Item 28 of the contract required Appellant to provide appropriate assistance on an ongoing basis to all interested parties regarding properties available for sale. "Interested parties" included potential homebuyers, repair contractors, appraisers, HUD officials, and city officials regarding code violations. Appellant was to provide repair contractors with information, if requested, on the repair work that would be needed on a property, and whether those repairs would be performed before closing or after closing as "escrowed repairs." Information about "escrowed repairs" was required to be posted in the properties, and escrow repair sheets were required to be kept by Appellant in each property file. Appellant received many telephone calls for information that it did not believe it was required to provide. Appellant refused to provide information about escrowed repairs to purchasers and brokers until it was directed by the contracting officer to do so at a meeting on June 18, 1993. After that date, Appellant complied with that specific directive, and was relieved of the duty of providing some other information. (AF Tab 2.1; Tr. 291-294; 831, 935-936.)

25. Appellant conducted its business out of the offices of Walker & Walker, which was a law firm operated by Walker's parents. The telephone used by Appellant to provide information and assistance about the contract properties was sometimes answered as "law offices," and not as "Sunbelt Properties." This caused considerable confusion. Also, persons answering the telephone on behalf of Appellant refused or were unable to provide basic information about the contract properties to brokers, buyers, and city officials, and were often rude

in their refusal to provide the information sought. HUD received a number of complaints about Appellant's refusal to provide assistance and information. The GTR and other HUD employees were often unable to reach Appellant by telephone because of a constant busy signal, which had a negative impact on administration of the contract. Walker considered HUD's concerns about the telephone problem to be "Mickey Mouse," and had no intention of getting additional phone lines for use during the term of the contract. Appellant believed that the telephone problem had been solved at a meeting with HUD on June 18, 1993, but the GTR was still having trouble getting through as late as July 9. Jones also did not return the calls of GTR Nix in a timely manner, which eroded the working relationship between HUD and Appellant. (AF Tab 4.12; Exh. G-18; Tr. 295-305; 849-854, 914-915, 935, 942-943, 987.)

26. Service Item 33 of the contract required Appellant to arrange for daily weekday mail pickup and delivery to and from the HUD office, except on holidays. HUD considered daily written communication to be essential for proper contract administration and performance because of the time-sensitive nature of the contract. Appellant was to deliver inspection reports to HUD on a daily basis, and to receive Rapid Reply letters from HUD the same day they were written, if possible. Appellant repeatedly failed to comply with Service Item 33 of the contract. The contract began on Tuesday, June 1, 1993. Appellant did pick up its mail from HUD that day, but Appellant did not pick up its mail again at HUD until Monday, June 7, 1993, when Jones came in after 3 p.m. to pick up Appellant's mail. Nix was so concerned about Appellant's failure to pick up its mail on a daily basis that she brought the problem to the attention of the contracting officer. The problem recurred on June 29, 1993, when Appellant again failed to pick up its mail. Jones would sometimes leave mail in the mailbox if he didn't believe it was important. This conduct impeded efficient performance and administration of the contract. (AF Tabs 4.8, 4.11; Exh. G-19; Tr. 306-312, 866.)

27. Service Item 36 of the contract required Appellant to complete HUD Form 9516(a), the initial inspection report, within five working days of assignment of a property, and thereafter as required by HUD. The initial inspection report is a particularly important document for administration and performance of the REAM contract because it identifies the initial condition of a property, its insurability, and what repairs are needed before it can be sold. Appellant had a pattern of failure to complete HUD Form 9516(a) and to deliver it to HUD within five working days of assignment of a property. This problem was exacerbated by Jones' refusal to bring the reports into Nix's office, and by putting these reports in a mail slot assigned to Appellant for receipt of mail from HUD to Appellant. (AF Tab 2.1; Exh. G-20; Tr. 316.)

28. Service Item 38 of the contract required Appellant to provide a fully staffed office available to HUD contractors, appraisers, and HUD authorized personnel on weekdays during the business hours of 8 a.m. to 5 p.m., except for Federal holidays. Problems with an adequately staffed office and competent phone answering services occurred immediately. Appellant's phone rang unanswered, was constantly busy, or was picked up and immediately disconnected. One HUD staff member dialed Appellant's phone over 100 times in a single day before she was able to reach Appellant. On June 3, 1993, Nix called Jones to find out why there was such a problem reaching Appellant by telephone, and Jones informed her only that he was "working on the problem." (AF Tab 4.7; Exh. G-21; Tr. 330-331.)

29. Service Item 23 of the contract required Appellant to collect rental amounts on a timely basis, per HUD's instructions. Service Item 24 required

Appellant to deposit rental collections within 24 hours of receipt, per HUD's instruction, in accordance with Exhibit 10 of the contract specifications grid. Exhibit 10 also required Appellant to forward rent and other collections to the HUD lock box within 24 hours after receipt, and to complete a separate transmittal form for each check or money order transmitted. Appellant received a rental check for \$600 on or about June 2, 1993, but it remained on Walker's desk until at least June 25, when Nix called Jones to find out if Appellant had received the rental check. Jones told Nix that Appellant had received the check, but that Appellant did not know what to do with it. Appellant's failure to forward the \$600 rental check to the HUD lock box for over three weeks, and to make no inquiry about how to forward it to the HUD lock box, was a failure to perform Service Item 24 of the contract. (AF Tabs 2.1, 4.19; Tr. 340.)

30. The SAMS inventory report given to Appellant at the start of the contract was not accurate, primarily because it continued to list some properties that had already been sold. The confirming delivery order dated June 1, 1993, which was given to Appellant on June 15, was also inaccurate. Appellant detected many of these errors during the course of the contract, but Appellant had no contractual duty to determine whether a property was correctly listed in the inventory prepared by HUD. It also discovered from county records that at least 34 properties listed in the contract inventory had already been sold by June 1, 1993. The SAMS reports given to Appellant never were completely accurate, and the problem was compounded by the fact that neither HUD nor its closing agents were promptly notifying Appellant when a property closed and was removed from the inventory. However, Appellant failed to place proof of this information as to each of these sold properties in evidence so that it could be compared to the lists of properties on which HUD found performance failures. In the absence of that evidence, there is insufficient proof on which to find that errors in the SAMS reports and confirming delivery orders were the cause of Appellant's performance failures. (AF Tabs 2.1, 2.5, 2.6, 2.7, 2.8; 5, 6; Exhs. G-1, G-23; Tr. 424-427, 449-460, 832-837, 857-861, 950-951.)

31. On June 11, 1993, the contracting officer issued a letter of concern to Appellant about the many complaints that HUD had received concerning Appellant's performance failures and the GTR's concerns about Appellant's lack of performance. As of that date, Appellant was failing to satisfactorily perform almost every service item of the contract. The contracting officer was not satisfied by Walker's response to the letter of concern because he only "repudiated" all of the problems identified by the contracting officer. (AF Tabs 3.13, 3.16, 4.12; Tr. 383-384.)

32. On June 16, 1993, the contracting officer issued a cure notice to Appellant because there was no apparent improvement or correction of the contract performance problems noted in the letter of concern. The contracting officer sent a cure notice to Appellant, although he knew that he was not required to do so because of the nature of the contract. The contracting officer wanted Appellant to cure its performance deficiencies so that the contract would not have to be terminated. (AF Tab 3.15; Tr. 382-383, 400.)

33. The contracting officer held a meeting with Jones and Walker for June 18, 1993. The meeting was partially audiotaped, and the audiotape was later transcribed with the assistance of Joyce Swallow, who had attended the meeting for HUD. The meeting was attended by Walker, Jones, and Mark Estes, the computer consultant, for Appellant, and by the contracting officer, Nix, and Larry Cook for HUD. The meeting lasted for several hours and a number of subjects were discussed, including a properly staffed office, providing appropriate assistance to HUD, its clients, and appraisers; the repair escrow

sheets, lock boxes and keys, the computer system developed by Estes for Appellant, and repairing defective paint. Estes was trying to computerize the initial inspection reports, and he was having difficulty with that computer program, which caused delays in the production of initial inspection reports. The contracting officer considered it a waste of time to computerize inspection reports because it was not required by the contract, and the forms were provided by HUD to be filled out during the inspections themselves. Appellant was also demanding that HUD provide the keys for the lock boxes at HUD expense. Appellant, through Walker, refused to cure any defective paint, claiming that it did not want to risk exposing any subcontractor to a lead hazard. The contracting officer considered Appellant's refusal to cure any defective paint, in spite of the contract requirement that it do so, as a repudiation of the contract requirement, and a default. Nonetheless, it was the impression of Estes and Walker that everything was settled between HUD and Sunbelt, and that their problems were resolved. Swallow also has the impression that, for the most part, Sunbelt and HUD would continue on a new and better footing, but she was not present for the last part of the meeting. (AF Tab 4.17; Exh. G-24; Tr. 387-392, 396-399, 707, 763-764, 986.)

34. On June 29, 1993, the contracting officer issued a notice to Appellant to show cause why the contract should not be terminated for default. The contracting officer did this to give Appellant "every reasonable opportunity" to respond to HUD's concerns, because the contracting officer still wanted to avoid terminating the contract for default. (AF Tab 3.21; Tr. 400.)

35. Walker responded to both the cure notice and show cause notice in a single document, but he failed to satisfy the concerns of the contracting officer about Appellant's performance. HUD continued to receive so many complaints about Appellant's failure to perform contract service items that the contracting officer concluded "[t]here was no end to the complaints and the problems." In its written response, Appellant demanded that all new delivery orders be in writing, never orally given with confirmation in writing; it refused to deliver documents directly to Nix's desk, although directed to do so; and it admitted that it had failed to remove lock boxes after it had been given notification to do so. (AF Tab 3.22; Tr. 401-404.)

36. On July 8, 1993, Nix wrote a memorandum to the contracting officer about the continuing serious problem of Appellant's lack of contract performance. Inspection reports showed that lawn maintenance problems had not been solved, and cuts were being made late or were not complete in some cases. After further consultation with Nix, the contracting officer terminated Appellant's contract for default on July 12, 1993. (AF Tabs 1.1, 4.22, 4.23, 4.30; Exh. G-13; Tr. 406, 408.)

#### Discussion

Default termination is a drastic action which should only be taken for good cause on the basis of solid evidence, ABC Group, HUDBCA No. 88-3384-C3, 88-3 BCA ¶20,990, but the Government is entitled to strict compliance in contract performance. Ibid. Termination of a service contract for default will be sustained if the performance failure is more than de minimis and reasonably substantial. Edward E. Davis Contracting, Inc., ASBCA No. 22646, 80-1 BCA ¶14,422. The record in this case is replete with repetitious failures by Appellant to perform its obligations under the contract, failures which were magnified by the need for timely performance of necessary work on the hundreds of HUD-owned properties in the contract inventory. HUD had every reason to

expect satisfactory performance by Appellant, and we find no evidence that HUD was the cause of Appellant's performance failures.

The factual record in this case is so dominated by Appellant's refusals to perform contract requirements and failures to perform acceptably or on time that this Board concludes that very few of the elements of contract compliance can be viewed as adequate. The REAM contract at issue was an indefinite quantity fixed-price service contract. A service contract has a new delivery date every time performance of the services is required. Emancar, Inc., HUDBCA No. 80-534-C12, 82-1 BCA ¶115,531. Appellant has failed to show that its performance failures were beyond its control and otherwise excusable. The contracting officer in this case gave Appellant several opportunities to correct its performance failures before the contract was terminated for default even though the issuance of show cause letters and cure notices are not required for a service contract. Emancar, Inc., supra.

From contract inception, Appellant failed to commit sufficient personnel to perform the contract in an acceptable and timely manner, despite Appellant's assurances that it would do so. Appellant spent time, money, and effort on a computer program that was not required or necessary for contract performance, while failing to perform the specific requirements of the contract. The lawn maintenance requirements were all but ignored by Appellant, and its failure to simply cut grass were so egregious that HUD was charged with municipal fines because of Appellant's failure to perform this basic task of its contract. Closings were postponed because Appellant failed to perform contract requirements. Appellant flagrantly ignored directives from the GTR that were reasonable, and related directly to needed performance of specific contract requirements. We find that Appellant's unexcused refusals and failures to perform had an immediate and continuing detrimental effect on the administration of the REAM contract.

#### Conclusion

We find that HUD has shown by a preponderance of the evidence that the default termination of Appellant's REAM contract was justified as a matter of fact and law. Therefore, Sunbelt's appeal of the termination or default of its REAM contract is DENIED.

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Jean S. Cooper  
Administrative Judge

Concur:

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David T. Anderson  
Chief Administrative Judge

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Jerome M. Drummond  
Administrative Judge

Date: February 16, 1999